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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-382

WADE V. CARTER, JR., FRANK R. COSTANZO, ARTHUR M. HILAND, ROBERT KNAPP, YANE LEVES, LEONARD B. WILSON, and all others similarly situated,

*Petitioners,*

vs.

PANAMA CANAL COMPANY,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Wade V. Carter, Jr., et al. pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on June 5, 1972.

## Opinions Below

The Decision and Order of the United States District Court for the District of Columbia, printed as Appendix B hereto, are reported at 314 F. Supp. 386 (D.D.C. 1970). The opinion of the United States Court of Appeals for the District of Columbia Circuit, printed as Appendix C hereto, is reported in —— F.2d —— (D.C.Cir. 1972).

## Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 5, 1972 (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## Questions Presented

Where towing locomotive operators employed by the Panama Canal Company are required to spend a period of approximately 15 minutes each day, in addition to their regular work day, in checking an assignment board to learn the location and identity of their locomotives and then walking to said locomotives:

a) Did not the Court below err in determining that the provisions of the Portal-to-Portal Act are applicable to federal wage board employees so as to preclude the payment of overtime for such activity?

b) Did not the Court below err in determining that such locomotive operators were not entitled to overtime under the provisions of the Federal Employees Pay Act?

## Statutes Involved

The statutory provisions here involved are the Federal Employees Pay Act, 5 U.S.C. Sections 5544 and 5341(a); the Portal-to-Portal Act, Section 4, 29 U.S.C. § 254 and the Fair Labor Standards Act, Section 18(b), 29 U.S.C. §218(b).

## Statement of the Case

In order for a vessel to transit the Panama Canal, it must pass through three lockage areas with the assistance of electrical towing locomotives which move along the lock walls and are operated by the petitioners in this case (2a, 19a, 43a).* Since the Canal operates on a 24 hour basis the operators of the locomotives, who are employed by the Panama Canal Company, work eight hour shifts (20a, 44a, 82a). Each operator is required by the Company to be at his locomotive at the start of the eight hour shift (82a).

However, the operators are not permanently assigned to any one locomotive and do not know to which locomotive they will be assigned from one day to the next (3a, 21a). Moreover, since a lomocotive may be located anywhere along the lockwall at the conclusion of a shift the operators are similarly unaware of the location of their locomotives at the time they report for duty (100a).

In order to learn the identity and location of their locomotives for each shift, the court below found that operators are required by "an established custom or practice" to check a lockage assignment board located near the gate of the lockage area (20).** The lockage assignment board,

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*References are to pages of the Appendix filed with the court below.

**References which are not followed by the letter "a" are to pages of the appendix annexed to this Petition.

however, may be located as much as two to fifteen minutes walk away from an operator's locomotive or duty station (4a, 24a, 99a). By necessity, therefore, the operators must check the assignment board at least 15 minutes in advance of the time they are required to be at their locomotives for eight hour shifts.[1] It is this daily 15 minute period for which the operators sought unpaid overtime pay by commencing the instant action.

After having sought unsuccessfully for several years to persuade the Company to pay overtime compensation for the period here in question (120a-121a, 136a-141a), the petitioners brought this action in the United States District Court for the District of Columbia on behalf of themselves and all others similarly situated, a class action being intended, for overtime pay pursuant to 5 U.S.C. § 5544.[2] The relief sought was an order directing an accounting and the payment of all unpaid overtime monies for the activity in question from July 29, 1965 to date[3] and ordering the Company to continue said payments in the future.

The District Court dismissed the complaint, after trial, holding that the case either fell under the Portal-to-Portal Act of 1947, 29 U.S.C. § 251 *et seq.* or the "de minimis" rule enunciated by this Court in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S. Ct. 1187 (1946), and that

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[1] The Court of Appeals found that the Panama Canal Company "expects" the operators "to check in at the lockage area gate sufficiently ahead of the time their shift begins to enable them to note the assignment board and walk to their assigned locomotive." This expectation, according to the court below created an "established custom and practice" made necessary by the requirement to be at the locomotive at the start of a shift (20).

[2] The District Court's jurisdiction arose under 2 Canal Zone Code § 61(c) and 65(a)(3).

[3] July 29, 1965 is the cutoff date for the instant claims under the appropriate three year statute of limitations established at 5 Canal Zone Code § 42(3)(a).

in either event the activity in question was not compensable. The Court of Appeals affirmed, without consideration of the application of the *de minimis* rule, holding that the Portal-to-Portal Act does in fact apply to the facts in this case.

Petitioners herein seek review since the decision of the Court of Appeals has decided an important question of federal law not previously considered by this Court—namely, the applicability of the Portal-to-Portal Act to federal wage board employees. Moreover, the decision below conflicts with several decisions rendered by the U.S. Court of Claims in which overtime pay was awarded to wage board personnel for activity similar to that here in issue without application of the Portal-to-Portal Act.

## Reasons For Granting the Writ

### I. The Decision of the Court Below That The Portal-to-Portal Act is Applicable to Federal Wage Board Employees was in Error and Raises an Important Question of Federal Law, Affecting Thousands of Federal Employees, Which Has Not Previously Been Considered By This Court

The petitioners in this case seek unpaid overtime compensation from respondent Panama Canal Company pursuant to 5 U.S.C. § 5544. That section of the Federal Employees Pay Act (FEPA) deals with the payment of overtime pay to wage-board employees of the federal government and provides in pertinent part:

> "An employee whose basic rate of pay is fixed and adjusted from time to time in accordance with prevailing rates by a wage board or similar administrative authority serving the same purpose is entitled to

overtime pay for *overtime work* in excess of 8 hours a day or 40 hours a week . . ."

* * *

". . . Time spent in a travel status away from the official duty station of an employee subject to this subsection is not hours of work unless the travel (i) involves the performance of work while travelling, (ii) is incident to travel that involves the performance of work while travelling (iii) is carried out under arduous conditions or (iv) *results from an event which could not be scheduled or controlled administratively*" (emphasis supplied).

Petitioners maintain that in view of respondent's "established custom and practice" of expecting them "to check in at the lockage area gate sufficiently ahead of the time their shift begins to enable them to note the assignment board and walk to their assigned locomotive," this activity is "work" within the meaning of 5 U.S.C. § 5544 and is thereby compensable since it is work in excess of 8 hours a day. This position is buttressed by the fact that the day-to-day location of the locomotives is an event which apparently cannot be "scheduled or controlled administratively."

The applicability of 5 U.S.C. § 5544 to petitioners as wage-board employees of the Panama Canal Company has been conceded by respondent (36) and confirmed by decisions of this Court and the U.S. Court of Claims. *U.S. v. Townsley*, 323 U.S. 557 (1945) and *Hearne v. U.S.*, 68 F.Supp. 786 (Ct. of Clms. 1946), cert. den'd 331 U.S. 858 (1946).[4] However, instead of determining the issues in this case under 5 U.S.C. § 5544 the Court of Appeals relied on those provisions of the Portal-to-Portal Act, 29 U.S.C. § 251 *et seq.* which exempt employers from liability for

[4] See also Section 17(3) of Pub. L. 85-550, 72 Stat. 411.

overtime compensation for certain types of employee activity. Thus, although the definition of "employer" contained in the Portal-to-Portal Act expressly excludes the federal government,[5] the court below held that "the Portal-to-Portal Act limitations on compensable overtime" applied "to federal wage board employees covered under 5 U.S.C. § 5544(a)." (44)

In reaching this novel conclusion the Court relied in the main on the language of Section 18(b) of the FLSA, 29 U.S.C. § 218(b). which was adopted by Congress in 1967 and provides:

> "(b) Notwithstanding any other provision of this chapter (other than section 213(f) of this title) or any other law—
>
> (1) any Federal employee in the Canal Zone engaged in employent of the kind described in section 5102(c)(7) of Title 5 or
>
> (2) any employee in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, shall have his basic compensation fixed or adjusted at a wage rate that is not less than the appropriate wage rate provided for in section 206(a)(1) of this title (except that the wage rate provided for in section 206(b) of this title shall apply to any employee who performed services dur-

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[5] Section 13(a) of the Portal-to-Portal Act, 29 U.S.C. § 262(a) provides that:

"(a) When the terms 'employer', 'employee' and 'wage' are used in this chapter in relation to the Fair Labor Standards Act of 1938, as amended, they shall have the same meaning as when used in such Act of 1938."

Section 3(d) of the FLSA, 29 U.S.C. § 203(d), defines "employer"

". . . (A)ny person acting directly or indirectly in the interest of an employer in relation to an employee, *but shall not include the United States* . . ." (emphasis supplied)

ing the work week in a work place within the Canal Zone) and *shall have his overtime compensation* [illegible] *at an hourly rate not less than the overtime rate provided for in section 207(a)(1) of this title.*" (emphasis supplied)

Reasoning that by this amendment Congress intended to apply the principle of comparability of federal and private pay[*] to federal wage board employees the Court of Appeals concluded that the principle would be defeated if the Portal-to-Portal Act limitations were not also applied to wage board personnel. In short, the court below read the Portal-to-Portal Act limitations into 5 U.S.C. § 5544 in order to prevent what it felt would be an unfair advantage to federal employees.

In order to justify its conclusion in this case of first impression the Court of Appeals embarked on a tortuous examination of the legislative history of 29 U.S.C. § 218(b), 5 U.S.C. § 5544(a) and other federal pay legislation. Nowhere, however, could it find any language clearly stating that the Portal-to-Portal Act now applies to federal wage board personnel. Indeed, since Congress has traditionally exempted the Federal Government from the obligations of wage and labor legislation covering the private sector, it would certainly appear that had it intended to do something as dramatic as extending the Portal-to-Portal Act to federal employees it would have done so in clear and direct language.

Rather than bringing federal employees under the restrictions of the Portal-to-Portal Act, Section 218(b) of

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[*] See e.g. the statement of congressional policy contained in the Federal Salary Reform Act of 1962, Pub.L. 87-793, Part II, 76 Stat. 841, that "Federal salary rates shall be comparable with private enterprise salary rates for the same levels of work." (now 5 U.S.C. § 5301(a) (3)).

the FLSA, as well as 5 U.S.C. § 5341(a),[7] do nothing more than establish a floor for the wages of federal wage board personnel. Thus, Senate Report No. 1487 explains that the language of 29 U.S.C. § 218(b) was added to the FLSA:

> ". . . to affirm that no employee of the Federal Government, or of an instrumentality under the jurisdiction of the Federal Government should receive compensation at rates less than those prescribed by the Federal act for private employment."[8]

Indeed, the legislative history relied on by the Court of Appeals (27-35) only bolsters the conclusion that the minimum wage limitations now applicable to federal employees were designed to establish a *minimum* wage for federal personnel and not to bring the entire sweep of the Fair Labor Standards Act, including the Portal-to-Portal Act, to bear on federal wage board employees. Had Congress so intended it surely would have revised the definition of employer at Section 3(d) of the FLSA which now expressly excludes the United States.

The concern of the court below that the principle of comparability would be violated if the Portal-to-Portal Act were not applied to 5 U.S.C. § 5544 is not well founded. It must be remembered that employees in the private sector may, through collective bargaining, negotiate an agreement which makes compensable, activity which would

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[7] That statute provides:

"(a) The pay of employees excepted from chapter 51 of this title by section 5102(c)(7) of this title shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates. Subject to section 213(f) of title 29, the rates may not be less than the appropriate rates provided for by section 206(a)(1) of title 29."

[8] 1966 U.S. Cong. and Adm. News, p. 3024.

normally be exempt under the Portal-to-Portal Act. (See 29 U.S.C. § 254(a)). Federal employees do not enjoy such rights and must rely upon Congress for establishment of their wage and benefit rates. Accordingly, if the Portal-to-Portal Act is applied to wage board employees they will actually be placed at a disadvantage since they cannot negotiate away the limitations of the Portal-to-Portal Act. Moreover, the restrictions on payment of overtime while in a "travel status" as set forth in 5 U.S.C.§ 5544(a) and which differ from the Portal-to-Portal Act limitations, clearly represent the portal-to-portal limitations which Congress felt should apply to federal wage board personnel.*

The decision of the Court below deals with an important question of federal law vital to the interests of thousands of federal wage board employees. Since the issues raised herein have not been considered by this Court we respectfully submit that certiorari should be granted so that the Court may fully consider the important questions here presented.

## II. The Decision Below Conflicts With Decisions Rendered by the U. S. Court of Claims

In several decisions the U.S. Court of Claims has held that federal employees are entitled to overtime compensation for activity similar to that here in question. *Abbott* v. *United States*, 151 F. Supp. 929 (1957); *Albright* v. *U.S.*, 161 Ct. Cl. 356 (1963) and *Baylor* v. *U.S.* —— F.2d —— (No. 109-67, 1972).

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* Congress has seen fit to provide higher minimum benefits to federal employees over private employees. Thus e.g. 5 U.S.C. § 5544 provides for payment of overtime for all work performed after 40 hours in one week and 8 hours in one day. Under 29 U.S.C. § 207(a) private employees are entitled to overtime only after 40 hours in one week. Again, the additional benefits for federal employees is not really unfair since they may negotiate better overtime rates while federal personnel must accept the will of Congress.

*Abbott* v. *U.S.*, *supra*, also involved a suit for overtime pay brought by wage board employees of the Panama Canal Company—in this case pilots—pursuant to the predecessor to 5 U.S.C. § 5544. The time in dispute consisted of travel time spent on respondent's vessels which took the pilots back to their starting point after they had piloted a transiting ship through one or more lock areas. No "work" was performed by the Pilots during these trips other than the act of travelling back to the starting point of their job. Clearly, this travel time would not have been compensable under Section 4 of the Portal-to-Portal Act, 29 U.S.C. § 254 Nonetheless, the Court of Claims held that such activity was compensable overtime.

In this case, the activity in question is surely more arduous than that involved in *Abbott* and more vital to the interests of respondent. Rather than simply sitting on a vessel the petitioners must check an assignment board to ascertain the location of their locomotives and then walk to the locomotives—acts entirely for the convenience of respondent. If the Portal-to-Portal Act was not applicable in *Abbott* it surely is not applicable in the case at bar.

Similarly, in *Albright* v. *U.S.*, 161 Ct. Cl. 356 (1963), the Court of Claims held that security guards were entitled to overtime pay for the 15 minute daily period during which they were required to report, draw their equipment and take the 2 to 10 minute walk to their posts in order to be there at the start of their tour of duty. This procedure enabled officials at the Naval Base involved to avoid having a post unmanned, just as the procedure employed by respondent in this case insures continuous operation of the locomotives.

While the guards in *Albright* were not "wage board" employees, the principle of "comparability" relied on by the court below would require application of the Portal-to-Portal Act in order to prevent the guards in *Albright* from enjoying a pay advantage over their counterparts in

private industry. As in *Abbott*, however, the Court of Claims made no reference to the Portal-to-Portal Act.

It is thus apparent that the Court of Claims, the tribunal which normally handles wage claims of federal employees, has not extended application of the Portal-to-Portal Act to federal overtime compensation legislation. Certiorari should be granted in order to determine whether the policy of the District of Columbia Circuit or the Court of Claims is correct.

## Conclusion

The Court of Appeals for the District of Columbia Circuit has held that the Portal-to-Portal Act is applicable to federal wage board employees despite the existence of a statute—5 U.S.C. § 5544—expressly dealing with overtime compensation for these federal employees. This holding, which conflicts with decisions of the U.S. Court of Claims, raises an important question of federal law not previously considered by this Court and adversely affects thousands of federal employees. Accordingly, certiorari should be granted and the decision below reversed.

Respectfully submitted,

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# APPENDIX A

## (Statutes)

### Federal Employees Pay Act, 5 U.S.C. Section 5544(a)

Section 5544

(a) An employee whose basic rate of pay is fixed and adjusted from time to time in accordance with prevailing rates by a wage board or similar administrative authority serving the same purpose is entitled to overtime pay for overtime work in excess of 8 hours a day or 40 hours a week. However, an employee subject to this subsection who regularly is required to remain at or within the confines of his post of duty in excess of 8 hours a day in a standby or on-call status is entitled to overtime pay only for hours of duty, exclusive of eating and sleeping time, in excess of 40 a week. The overtime hourly rate of pay is computed as follows:

(1) If the basic rate of pay of the employee is fixed on a basis other than an annual or monthly basis, multiply the basic hourly rate of pay by not less than one and one-half.

(2) If the basic rate of pay of the employee is fixed on an annual basis, divide the basic annual rate of pay by 2,080, and multiply the quotient by one and one-half.

(3) If the basic rate of pay of the employee is fixed on a monthly basis, multiply the basic monthly rate of pay by 12 to derive a basic annual rate of pay, divide the basic annual rate of pay by 2,080 and multiply the quotient by one and one-half.

An employee subject to this subsection whose regular work schedule includes an 8-hour period of service a part of which is on Sunday is entitled to additional pay at the rate of 25 percent of his hourly rate of basic pay for each hour of work performed during that 8-hour period of

service. Time spent in a travel status away from the official duty station of an employee subject to this subsection is not hours of work unless the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively.

FAIR LABOR STANDARDS ACT—29 USC Section 201 et seq. Sec. 218

(a)

* * *

(b) Notwithstanding any other provision of this chapter (other than section 213(f) of this title) or any other law—

(1) any Federal employee in the Canal Zone engaged in employment of the kind described in section 5102(c) (7) of Title 5, or

(2) any employee employed in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces

shall have his basic compensation fixed or adjusted at a wage rate that is not less than the appropriate wage rate provided for in section 206(a) (1) of this title (except that the wage rate provided for in section 206(b) of this title shall apply to any employee who performed services during the workweek in a work place within the Canal Zone) and shall have his overtime compensation set at an hourly rate not less than the overtime rate provided for in section 207(a) (1) of this title.

PORTAL-TO-PORTAL PAY ACT—29 USC Section 251 et seq. Sec. 254

(a) Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punish-

ment under the Fair Labor Standards Act of 1938 as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947—

(1) walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

(b) Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

(1) an express provision of a written or nonwritten contract in effect at the time of such activity, between such employee, his agent or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) For the purposes of subsection (b) of this section, an activity shall be considered as compensable under such contract provision or such custom or practice only when

it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engage in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

## APPENDIX B

**(Opinion of District Court)**

**UNITED STATES DISTRICT COURT,**

**FOR THE DISTRICT OF COLUMBIA.**

**Civil Action No. 1890-68**

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WADE V. CARTER, et al.,

Plaintiffs

v.

PANAMA CANAL COMPANY,

Defendant

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**(Memorandum and Order of District Court)**

I.

The plaintiffs are towing locomotive operators employed by the defendant Panama Canal Company in the Canal Zone. They seek overtime pay of at least 15 minutes per day of allegedly compensable work computed in accordance with 5 U.S.C. § 5544 for all time spent performing the activity in question since July 29, 1965.

The defendant Panama Canal Company is a federally chartered corporation of the United States and is subject to suit in the United States District Court for the District of Columbia pursuant to 2 Canal Zone Code §§ 61(c) and 65(a)(3).

II.

To transit the Panama Canal a vessel must pass through three lockage areas, *i.e.*, Pedro Miguel and Miraflores on

the Pacific side, and Gatun on the Atlantic side. Each plaintiff works at one of the three areas on an eight hour shift.

The plaintiffs operate electrically-driven towing locomotives to pull ships through the locks and to control the lateral movement of the ships within the lock chambers. The locomotives move on each side of a lock chamber and travel the full length of the chamber wall.

At the end of any given work period the operator leaves his locomotive where it then is. That requires the succeeding operator to proceed to that point to assume his duties since historically the duty station of an operator has always been the locomotive to which he is assigned. However, prior to reporting to the lock area the operator knows neither the identity nor the location of the locomotive to which he is assigned for that particular work period. To learn the location and the identity of the locomotive to which he is assigned the operator must check at a lockage assignment board located within the lock area, put a mark by his name on the board, and walk to the designated locomotive.

At Gatun the assignment board is about 75 feet from the main gate; at Pedro Miguel the assignment board is within 25 feet of the main gate; and at Miraflores the board is located in the control house some 500 feet from the main gate.

The time consumed by an operator in walking from the lockage assignment board to his assigned locomotive varies from 2 minutes to 15 minutes per day depending upon the location of his assigned locomotive. The average time is 8 minutes.

There is no requirement that an operator report to the assignment board. The only requirement is that he report to his duty station (his locomotive) by the time his shift begins. However, since the assigned locomotive may be located the maximum distance from the assignment board, the operator of necessity must check the board a

least 15 minutes before the start of his eight hour shift to arrive at his locomotive on time.

During the period an operator is on defendant's premises prior to reaching his duty station he is subject to defendant's rules and regulations governing employees and may be disciplined for violation of those rules.[1]

Prior to January 1, 1968, locomotive operators were required to check in and out with a timekeeper at the main gate of the lock area merely for the purpose of determining their presence in the lock area, not for the purpose of timekeeping.

For a long period prior to the commencement of this case (and at least prior to July 29, 1965) the locomotive operators and their representatives, including National Maritime Union of America, AFL-CIO, have requested the Canal Company to pay overtime for the time spent between checking the assignment board and reaching the locomotives as well as the additional time spent, prior to January 1, 1968, in checking in with the timekeeper and walking to the assignment board. The Company has rejected all formal and informal claims for this overtime compensation.

The question before the Court is whether the activity of the plaintiffs in checking the assignment board and

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[1] An operator is also subject to a reporting procedure known as a call-in on an "as soon as possible" basis. Under this procedure an operator may be called in when there is a breakdown or the regularly scheduled locomotive operator is either ill or absent. On those occasions the operator receives compensation from the time he enters the gate at the lock area and the Company considers the time spent between entering the gate and reaching the locomotive as compensable work time. However, the emergency call-in for a locomotive operator creates an entirely different work situation than the normal scheduled work day. An emergency operator is in a stand-by situation without a particular duty station to report to immediately. Since he does not have an assigned duty station, and since he is present primarily for the benefit of the Company, a different standard must be used to fix his compensation and he is paid from the time he enters the main gate.

walking to their duty stations constitutes compensable overtime work. For the reasons listed below the Court concludes that it does not.

## III.

The plaintiffs rely on 5 U.S.C. § 5544,[2] the Federal Employees Pay Act, and the cases interpreting its application.[3] However, the Federal Employees Pay Act simply grants employees the right under certain conditions to compensation for overtime work. It does not fully set out the standards as to what constitutes compensable overtime. To determine the standards and the types of activity that fall within the standards (and are thereby compensable as overtime) the Court must look to the Fair Labor Standards Act, 29 U.S.C. § 217 *et seq.*, as amended

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[2] In reference to overtme pay the statute reads.

"(a) An employee whose basic rate of pay is fixed and adjusted from time to time in accordance with prevailing rates by a wage board or similar administrative authority serving the same purpose is entitled to overtime pay for overtime work in excess of 8 hours a day or 40 hours a week. However, an employee subject to this subsection who regularly is required to remain at or within the confines of his post of duty in excess of 8 hours a day in a standby or on-call status is entitled to overtime pay only for hours of duty, exclusive of eating and sleeping time, in excess of 40 a week . . .

• • •

"Time spent in a travel status away from the official duty station of an employee subject to this subsection is not hours of work unless the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carred out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively."

[3] The Supreme Court in *U.S.* v. *Townsley*, 323 U.S. 557, 65 S.Ct. 413, 89 L.Ed. 454 (1945) and *Hearne* v. *U.S.*, 331 U.S. 858, 67 S.Ct. 1750, 91 L.Ed. 1865 (1946) held that the predecessor to § 5544 (5 U.S.C. § 673c) was applicable to Panama Canal Company employees.

The so-called Morse Amendment to that Act, 29 U.S.C. §218(b) specifically made the Act's wage requirements applicable to all wage board employees of the Panama Canal Company. The Amendment provides that:

> "(b) Notwithstanding any other provision of this chapter (other than section 213(f) of this title) or any other law—
>
> (1) any Federal employee in the Canal Zone engaged in employment of the kind described in section 5102(c)(7) of Title 5 or
>
> (2) any employee in a non-appropriated fund instrumentality under the jurisdiction of the Armed Forces, shall have his basic compensation fixed or adjusted at a wage rate that is not less than the appropriate wage rate provided for in section 206(a)(1) of this title (except that the wage rate provided for in section 206(b) of this title shall apply to any employee who performed services during the workweek in a work place within the Canal Zone), and shall have his overtime compensation set at an hourly rate not less than the overtime rate provided for in section 207(a)(1) of this title."

The Portal to Portal Pay Act, 29 U.S.C. §§ 251-262, also amending the Fair Labor Standards Act, dealt specifically with the right to overtime compensation and it is to this act that the Court looks for guidance. The Portal to Portal Pay Act reads in pertinent part:

> "(a) Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of

any of the following activities of such employee engaged in on or after May 14, 1947—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

"(b) Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer." 29 U.S.C. § 254.

The plaintiffs rely heavily upon *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946) in which the Supreme Court addressed itself to the problem of what constitutes compensable activity. That case held that "the time necessarily spent by the employees in walking to work on the employer's premises, following

the punching of time clocks, was working time within the scope of the [Fair Labor Standards Act]." *Id.* at 691.

In the *Mt. Clemens* case the employees spent 2 to 12 minutes walking on the premises. This time was under the complete control of the employer since it depended solely upon the physical arrangements of his plant. Such walking was for the benefit of the employer to enable him to achieve his productive aims, and it was in no way related to the convenience and necessity of the employee. The Court distinguished this walking time from the time spent in traveling from the employee's home to work and concluded that:

> "[T]he time spent in walking to work on the employer's premises, after time clocks were punched, involved 'physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.' *Tennessee Coal Co.* v. *Muscoda Local*, 321 U.S. 590, 598, *Jewell Ridge Corp.* v. *Local*, 325 U.S. 161, 164-166. Work of that character must be included in the statutory work week and compensated accordingly . . ." *Id.* at 691-692.

The Court also held that time necessarily spent by employees in *preliminary* activities after arriving at their places of work must be included within the work week and compensated accordingly. *Id.* at 692-693.

However, in both of the situations noted above the Court said it would be appropriate to apply a *de minimus* rule "where the minimum walking time is such as to be negligible" or when the preliminary activities involved "insubstantial and insignificant periods of time." *Id.* at 692-693.

This decision standing alone is persuasive. However, one year after the Supreme Court spoke, the Portal to Portal Pay Act became law and it is quite evident from the text of the statute[4] as well as from its legislative history

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[4] *Supra*, page 6.

that Congress intended to blunt the effect of the *Mt. Clemens* decision.

The Reports of the Senate Judiciary Committee clearly indicate that Congress considered reporting to a station for daily assignment or walking to a work area on the employer's premises not compensable within the meaning of the Act.

> "[W]alking to his lathe, work bench, reporting station for his assignment for the day, or to other particular work location, is not to be considered an activity which is compensable under the Fair Labor Standards Act unless compensable by contract." S.REP. No. 37, 80th Cong., 1st Sess., 45 (1947).

To the same effect is Senate Report No. 48, 80th Cong. 1st Sess., 47 (1947), where it is stated:

> "The rule laid down is that activities which take place either prior to the time at the beginning of his workday, when such employee commences, or subsequent to the time at the end of his workday, when such employee terminates his principal activity or activities, are activities (called portal-to-portal activities) which are not compensable except by contract or by a practice or custom not inconsistent therewith. The following activities outside the workday are among those not to be considered compensable under the Fair Labor Standards Act unless made so by contract or by a practice or custom not inconsistent therewith:
>
> (1) Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities within the employer's plant, mine, building, or other place of employment, irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or before or after the employee has checked in or out. Examples

of this are (a) walking or riding from the plant gate to the employee's lathe, work-bench, or other actual place of performance of his principal activity or activities; (b) riding on busses from a town to an outlying mine; (c) riding on busses or trains from an assembly point to a particular site at which a logging operation is being conducted.

(2) Checking in or out and waiting in line to do so, changing clothes, washing up or showering, waiting in line to receive pay checks, and the performance of other activities occurring prior and subsequent to the workday, such as the preliminary activities which were involved in the Mt. Clemens case (U.S. No. 342, June 10, 1946).

The foregoing list of noncompensable activities is not intended to be exhaustive but merely to indicate some types of activities outside the employee's workday which are not to be compensable under the Fair Labor Standards Act . . ."

In the Senate debate over the enactment of this statute, Senator Cooper, the bill's principal sponsor, said:

". . . [W]e have believed that . . . in the Mt. Clemens case the Court went too far and that under the decision . . . activities were held to be compensable when logically and equitably there should be no compensation activities. . . . The Committee decided, first, that we should make noncompensable, walking, riding, or traveling to and from the actual place of performance of the principal activities which such employee is employed to perform. Then, clearly and definitely, as to the future, an employee cannot receive compensation for any *walking*, riding, or traveling time to the *actual place of performance* where he begins his *actual activities.*" (Emphasis supplied) 93 Cong. Rec. 2296-2297 (1947).

It has been held that only if the activities in question are an "integral part of and indispensable to" the employee's principal activity are they compensable under the portal to portal provisions of the Fair Labor Standards Act. *Steiner* v. *Mitchell*, 350 U.S. 247, 255, 76 S.Ct. 330, 335, 100 L.Ed. 267 (1956).

Whether the activities were such an integral and indispensable part of the employee's principal activity as to be compensable is a question of fact. *Dunning* v. *Q. O. Ordinance Corp.*, 233 F.2d 902, 903 (8th Cir. 1956).

The Court concludes that passing an assignment board and walking 2 to 15 minutes to a locomotive is not an "integral part of and indispensable to" the principal activity of operating the locomotive.

This activity is as much for the benefit of the employee as it is for the employer. Without passing an assignment board the operators would run the risk of not being on time at their locomotives. This is clearly distinguishable from the situation where an operator is called for emergency duty and receives compensation from the time he enters the gate. In this latter situation the benefit is all to the employer. Since it is not known immediately where the operator will work, he is usually on a stand-by basis to be used when and where the company needs him and is entitled under those conditions to be compensated.[5]

The other cases relied on by the plaintiffs, in addition to *Mt. Clemens*, are distinguishable on their facts from the case at bar. In *Abbott* v. *U.S.*, 151 F.Supp. 929 (Ct. of Claims, 1957) the vessel pilots in the Canal Zone were not compensated for the time spent in returning to their starting point after piloting a ship through the Canal if such time was in excess of their normal shift. The Court held that since this travel time was paid by the company when it was not overtime, it could not be considered noncompensable just because it was overtime. That situation is clearly different from the issue facing the Court here.

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[5] *Supra*, note 1.

In *Anderson* v. *Panama Canal Company*, 194 F.Supp. 765 (D.C.Z. 1961), *rev'd on other grounds*, 312 F.2d 98 (5th Cir.) *cert. denied*, 375 U.S. 832 (1963), dredge employees of the Company were not compensated for the time spent traveling in Canal vessels from the dock to the dredges. In holding this time compensable the Court noted that the dredge employees were often required to perform work forthe Company while traveling to the dredge. This also differs from the case facing the Court as the Court has concluded that checking a name on an assignment board is not compensable activity.

The plaintiffs rely on *Frank, et al.* v. *Wilson & Co.*, 172 F.2d 712 (7th Cir.) *cert. denied*, 337 U.S. 918 (1949) in arguing the inapplicability of the Portal to Portal Act to this situation. In *Frank* the Court found that a labor contract negotiated between the union and the company provided for overtime compensation for hours worked in excess of 40 hours a week. This contract as provided by §254(b) took the case out from under provisions of the Portal to Portal Act. In the case before the Court, however, there is not a negotiated contract but a statute giving federal workers a right to overtime compensation. A statute is clearly not a contract. If Congress had intended such a statute to also be an exception to the Act they obviously would have included it. And no mention of such an exception is found in the legislative history.

Aside from the appropriateness of the Portal to Portal Act in this situation, the activity here in question would fall under the *de minimus* rule. As noted above, the Supreme Court in *Anderson* v. *Mt. Clemens Pottery Co.*, *supra*, 328 U.S. at 693, 66 S.Ct. at 1195, 90 L.Ed. 1515, pointed to the applicability of the *de minimus* rule where the preliminary activity involved "insubstantial and insignificant" periods of time. The Court looked to the realities of the industrial world and said "[I]t is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is in-

volved." *Id.* at 692. This section of the opinion was not considered when Congress enacted the Portal to Portal Act and remains the rule today.

Cases subsequent to *Mt. Clemens* have held the following amounts of time consumed in preliminary activities or walking to be *de minimus: Frank, et al.* v. *Wilson & Co.*, 172 F.2d 712 (7th Cir.) *cert. denied*, 337 U.S. 918 (1949) (5 minutes); *McIntyre* v. *Joseph E. Seagram & Sons, Inc.*, 72 F.Supp. 366 (W.D. Ky. 1947) (10-20 minutes); *McComb* v. *C.A. Swanson & Sons*, 77 F.Supp. 716 (D. Neb. 1948) (10-11 minutes); *Lasater* v. *Hercules Powder Co.*, 73 F.Supp. 264 (E.D. Tenn. 1947) (possibly 10 minutes). Thus, the Court feels that the time required to look for and place a check mark by a name on the assignment board and walk to a duty station (2 to 15 minutes) is negligible and not compensable.

## IV.

The Court concludes that the activity in question whether it falls under the Portal to Portal Act or under the *de minimus* rule is not compensable.

Having reached this decision the Court finds it unnecessary to discuss defendant's claims of laches and estoppel.

It is, accordingly, this 20th day of May, 1970

ORDERED that the complaint be dismissed.

This memorandum constitutes the Court's findings of fact and conclusions of law.

H. J. CORCORAN,
Judge.

# APPENDIX C

**(Opinion of Court of Appeals)**

## United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 24,464

WADE V. CARTER, JR., ET AL., APPELLANTS

v.

PANAMA CANAL COMPANY

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Appeal from the United States District Court
for the District of Columbia

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Decided June 5, 1972

Judgment entered June 5, 1972

Before ROBINSON and MACKINNON, *Circuit Judges*, and GOURLEY,* *Senior District Judge* for the Western District

MACKINNON, *Circuit Judge:* Appellants, towing locomotive operators employed by the Panama Canal Company, brought this class action for overtime pay pursuant to 5

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* Sitting by designation pursuant to 28 U.S.C. § 294(d) (1970). of Pennsylvania.

U.S.C. § 5544[1] on behalf of themselves and their fellow operators. They appeal from an order of the District

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[1] 5 U.S.C. § 5544(a) contains the basic provisions for payment of overtime to federal "wage board" employees. It provides:

> (a) An employee whose basic rate of pay is fixed and adjusted from time to time in accordance with prevailing rates by a wage board or similar administrative authority serving the same purpose is entitled to overtime pay for overtime work in excess of 8 hours a day or 40 hours a week. However, an employee subject to this subsection who regularly is required to remain at or within the confines of his post of duty in excess of 8 hours a day in a standby or on-call status is entitled to overtime pay only for hours of duty, exclusive of eating and sleeping time, in excess of 40 a week. The overtime hourly rate of pay is computed as follows:
>
> (1) If the basic rate of pay of the employee is fixed on a basis other than an annual or monthly basis, multiply the basic hourly rate of pay by not less than one and one-half.
>
> (2) If the basic rate of pay of the employee is fixed on an annual basis, divide the basic annual rate of pay by 2,080, and multiply the quotient by one and one-half.
>
> (3) If the basic rate of pay of the employee is fixed on a monthly basis, multiply the basic monthly rate of pay by 12 to derive a basic annual rate of pay, divide the basic annual rate of pay by 2,080, and multiply the quotient by one and one-half.
>
> An employee subject to this subsection whose regular work schedule includes an 8-hour period of service a part of which is on Sunday is entitled to additional pay at the rate of 25 percent of his hourly rate of basic pay for each hour of work performed during that 8-hour period of service. Time spent in a travel status away from the official duty station of an employee subject to this subsection is not hours of work unless the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively.

The Supreme Court in United States v. Townsley, 323 U.S. 557 (1945) held the predecessor provision to Section 5544 in the Federal Employees Pay Act applicable to Panama Canal Company employees, and the parties have stipulated that the appellants are "wage board" employees within the meaning of Section 5544.

Court,[2] following trial, dismissing their complaint on the alternative grounds that their action was precluded by the Portal-to-Portal Act of 1947,[3] or that the time periods involved were so short as to fall within the *de minimis* rule noted by the Supreme Court in *Anderson* v. *Mt. Clemens Pottery Company*.[4] Since we concur that the Portal-to-Portal Act applies here, we affirm the order of the District Court on that basis without reaching the question of the application of the *de minimis* rule.

## I

In each of the three lockage areas of the Panama Canal vessels transiting the locks are guided and assisted by electrical towing locomotives moving along the walls of the lock chamber. Appellants here are operators of these locomotives.

The Canal is never closed, so the operators work eight-hour shifts that begin and end with the relief on the locomotive itself of the operator who worked the prior shift. Since any locomotive might be at any point along the chamber wall at the end of a shift, and since the operators are not permanently assigned to a specific locomotive, each shift begins with each operator checking an assignment board located near the gate to the lockage area to learn which locomotive he is to operate and where it can be found. He must then walk to the locomotive and be ready to assume control when the shift begins. Depending on the lockage area and the distance of the locomotive from the gate at that particular time, this entire process, including the walk to the locomotive can take as little as

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[2] Carter v. Panama Canal Co., 314 F. Supp. 386 (D.D.C. 1970) (Corcoran, J.).

[3] May 14, 1947, ch. 52, 61 Stat. 84, *as amended*, 29 U.S.C. §§ 251-62 (1970).

[4] 328 U.S. 680, 692 (1946).

two minutes or as much as fifteen minutes. In order to assure that the operators are on their assigned locomotives at the beginning of the shift, the Company expects them to check in at the lockage area gate sufficiently ahead of the time their shift begins to enable them to note the assignment board and walk to their assigned locomotive.[5] Operators are not required to punch a time clock and no formal time record is kept of the time they report and are relieved.

For several years prior to the initiation of this suit, appellants unsuccessfully attempted to persuade the Company that they were entitled to compensation for the time spent in checking the assignment board and walking to the locomotives from the gate. Since they work a full

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[5] The District found that:

> There is no requirement that an operator report to the assignment board. The only requirement is that he report to his duty station (his locomotive) by the time his shift begins. However, since the assigned locomotive may be located the maximum distance from the assignment board, *the operator of necessity must check the board at least 15 minutes before the start of his eight hour shift* to arrive at his locomotive on time.

314 F. Supp. at 387 (emphasis added). Appellants urge that this finding that there is "no requirement" to report early "was against the weight of overwhelming evidence to the contrary. . . ." Brief for appellants, at 5. The evidence cited does not reveal any formally published regulation or requirement, but rather an informal expectation on the part of both the operators and Company officials that the operators would report early enough to check the assignment board and get to their locomotives. This expectation thus seems to fall within the common rubric of "an established custom or practice" made necessary by the requirement to be on the locomotive at the start of the shift (see emphasized portion of finding) rather than a formal requirement to report early. At any rate, the existence *vel non* of such a requirement would not affect our determination of the case; the critical factor for that determination is the requirement to be present on the locomotive, prepared to begin the operators' "primary duties" at the start of the shift.

eight-hour shift on the locomotive,[6] this extra time would have to be compensated at overtime rates. The issue in this suit is whether the operators are entitled to overtime compensation pursuant to 5 U.S.C. § 5544 for the time spent in checking the assignment board and walking to their locomotives.

## II

The basic legal problem confronting us on this appeal is the reconciliation of two closely related but separate bodies of federal legislation concerning employment compensation. In the Fair Labor Standards Act of 1938 (FLSA),[7] as amended and as modified by the Portal-to-Portal Act of 1947, Congress has enacted an extensive scheme of regulation of wages and hours to govern a broad portion of the private employment relationships in the United States.[8] Through an even more complex body of legislation, of which Section 5544 is only a small part, Con-

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[6] Actually, the Company has long acquiesced in the practice of permitting the relieved operators to leave the locomotive at the time of their relief. Thus, if the on-coming operator relieves him on the locomotive before the beginning of the shift, the relieved operator is permitted to leave the lockage area as much as 20 minutes before the end of his shift. This early relief practice is indicative of the informal time-keeping practices of the Company. In this regard the District Court found: "Prior to January 1, 1968, locomotive operators were required to check in and out with a timekeeper at the main gate of the lock area *merely for the purpose of determining their presence in the lock area, not for the purpose of timekeeping.*" 314 F. Supp at 388 (emphasis added). Since 1968, even that practice has been discontinued, and the operators merely check in with the security guard at the gate and mark their own name on the assignment board.

[7] June 25, 1938, ch. 676, 52 Stat. 1060, *as amended*, 29 U.S.C. §§ 201-19 (1970).

[8] The Fair Labor Standards Amendments of 1966, Pub. L. 89-601, 80 Stat. 830, were expected to extend FLSA coverage to 35.4 million of the estimated 47 million privately employed workers in America.

gress explicitly provides for the compensation and regulation of the terms of employment of various groups of employees of the Federal Government. Since the enactment of FLSA, both Congress and the courts have often looked to that body of employment regulations for guidance in analyzing and interpreting similar provisions in the complex of regulations governing federal employment. We continue that process here and conclude that the congressional policies behind the two acts require that the Portal-to-Portal Act provisions should apply to these federal wage board employees.

A. *The Relationship of the Fair Labor Standards Act and the Portal-to-Portal Act*

There is little room for question that if the Panama Canal Company were a private employer meeting the jurisdictional requirements of the FLSA,* the appellants' suit would be precluded by the Portal-to-Portal Act. If the Company were covered by the FLSA, the locomotive operators would be entitled to the protection of Section 7(a):

> [N]o employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1) (1970). The hours to be included in any "workweek" receive only a limited, exclusionary definition in the statute, 29 U.S.C. § 203(*o*) (1970), so the initial question would be whether the time spent in check-

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* These requirements include meeting the definitions of 29 U.S.C. § 203 for an employer engaged in interstate commerce, but not falling within any of the specific exemptions of 29 U.S.C. § 213.

ing the assignment board and walking to the locomotives constituted part of the "workweek." In *Anderson* v. *Mt. Clemens Pottery Company*, 328 U.S. 680 (1946), the famous case that launched the Portal-to-Portal legislation, the Supreme Court was called upon to determine this question in a factual setting quite similar to the present case, and they found:

> Since the statutory workweek includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace, the time spent in these activities must be accorded appropriate compensation.
>
> . . . . [T]he time necessarily spent by the employees in walking to work on the employer's premises, following the punching of the time clocks, was working time within the scope of § 7(a). . . . Such time was under the complete control of the employer, being dependent solely upon the physical arrangements which the employer made in the factory. Those arrangements in this case compelled the employees to spend an estimated 2 to 12 minutes daily, if not more, in walking on the premises. Without such walking on the part of the employees, the productive aims of the employer could not have been achieved. The employees' convenience and necessity, moreover, bore no relation whatever to this walking time; they walked on the employer's premises only because they were compelled to do so by the necessities of the employer's business. In that respect the walking time differed vitally from the time spent in traveling from workers' homes to the factory. . . . It follows that the time spent in walking to work on the employer's premises, after the time clocks were punched, involved "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the

> benefit of the employer and his business." . . . Work of that character must be included in the statutory workweek and compensated accordingly, *regardless of contrary custom or contract.*

328 U.S. at 690-92 (citations omitted) (emphasis added). It is clear to us that this test of the "workweek" would encompass the activities of the locomotive operators bringing the present action.

The congressional reaction to the *Mt. Clemens Pottery* decision was strong and quick, resulting in passage of the Portal-to-Portal Act at the very next session of Congress less than a year later. Focusing on the final clause of the quoted portion of the decision, Congress found

> that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, . . . a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce [would result].

Portal-to-Portal Act of 1947, § 1(a), 29 U.S.C. § 251(a) (1970).

The operative provisions of the Portal-to-Portal Act which reversed the *Mt. Clemens Pottery* decision are:

> (a) Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the [FLSA] . . . on account of the failure of such employer to pay an employee . . . overtime compensation, for or on account of any of the following activities of such employee . . .

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities.

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time . . . at which he ceases, such principal activity or activities.

(b) Notwithstanding the provisions of subsection (a) of this section . . . the employer shall not be [relieved from liability] if such activity is compensable by either—

> (1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or
>
> (2) a custom or practice in effect, at the time of such activity, at the establishment or other place where some employee is employed, covering such activity . . . .

*Id.* § 4, 29 U.S.C. § 254 (1970).

The "principal activity" of the appellants is the operation of the towing locomotives and the "actual place of performance" of this activity is the locomotive itself. Checking in at the assignment board is an activity "preliminary to" that "principal activity," and the daily walk to the locomotive certainly constitutes "walking . . . to . . . the actual place of performance of the principal activity." In addition, there is neither "an express provision of a written or nonwritten contract in effect," nor "a custom or practice in effect" under which the operators were be-

ing paid for these activities. Accordingly, we find that if the Canal Company were a private employer subject to the FLSA, the Portal-to-Portal Act would block the locomotive operators' attempt to recover overtime compensation for the time spent in checking the assignment board and walking to the locomotives prior to the commencement of their "principal activity" in operating the locomotives.

B. *Applicability of the Fair Labor Standards Act and Portal-to-Portal Act to Federal Employees*

As initially enacted, the FLSA expressly excluded all employees of the Federal Government from its coverage.[10] In recent years, however, there has been a growing congressional concern to ensure that federal employees do not lose, in the maze of statutory and regulatory provisions governing government employment, the advantages of basic compensation principles developed within the private employment sector. One of the most dramatic expressions of this concern was passage of the Federal Salary Reform Act of 1962[11] that contained, *inter alia*, a statement of congressional policy that "Federal salary rates shall be comparable with private enterprise salary rates for the same levels of work."[12] The principle of "comparability" with salaries of private enterprise, first expressed in this Act, has since motivated three specific statutory provisions involved in this action. It is from

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[10] This was accomplished by means of the statute's definition of the term "employer," which definition remains in the Act today: "'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States . . ." FLSA § 3(d), 52 Stat. 1060, 29 U.S.C. § 203(d) (1970).

[11] October 11, 1962, Pub. L. 87-793, Part II, Stat. 841.

[12] Federal Salary Reform Act of 1962, Pub. L. 87-793, Part II, Title I, § 502(b), 76 Stat. 841 (with minor revisions now codified at 5 U.S.C. § 5301(a)(3) (1970)).

these statutes, and their legislative history, that we derive our conviction that the Portal-to-Portal Act applies to the claim that appellants make here.

1. *The Fair Labor Standards Amendments of 1966.*

The District Court relied principally on Section 306 of the Fair Labor Standards Amendments of 1966 for its finding that the Portal-to-Portal Act applies to these locomotive operators.[13] This provision added a new subsec-

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[13] Fair Labor Standards Amendments of 1966, Pub. L. 89-601, Title III, § 306, 80 Stat. 841:

SEC. 306. Section 18 of such Act is amended by inserting "(a)" immediately after "SEC. 18." and by adding at the end thereof the following new subsection:

"(b) Notwithstanding any other provision of this Act (other than section 13(f), or any other law, any employee—

"(1) described in paragraph (7) of section 202 of the Classification Act of 1949 (5 U.S.C. 1082(7)) whose compensation is required to be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates, and any Federal employee in the Canal Zone engaged in employment of the kind described in such paragraph (7), or

"(2) described in section 7474 of title 10, United States Code, whose rates of wages are established to conform, as nearly as is consistent with the public interest, with those of private establishments in the immediate vicinity, or

"(3) employed in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,

shall have his basic compensation fixed or adjusted at a wage rate which is not less than the appropriate wage rate provided for in section 6(a)(1) of this Act (except that the wage rate provided for in section 6(b) shall apply to any employee who performed services during the workweek in a work place within the Canal Zone), and shall have his overtime compention set at an hourly rate not less than the overtime rate provided for in section 7(a)(1) of this Act."

A technical amendment in 1967 incorporated the first portion of subsection (b)(1) of Section 18 into the general federal wage board employee pay provision, 5 U.S.C. § 5341 (a), and deleted

(*footnote continued on following page*)

tion to the FLSA that explicitly brought federal wage board employees and two other classes of federal employees within the minimum wage and overtime compensation requirements of the FLSA. Appellants argue that this amendment should be construed narrowly. They quote a sentence from the Senate Report on the bill, that "[t]his provision has been added to the act to affirm that no employee of the Federal Government . . . should receive compensation at rates less than those prescribed by the Federal act for private employment,"[14] as standing for the proposition that only the imposition of a minimum floor for federal wages was intended. They argue that the Portal-to-Portal Act is one of the "other provisions of the act" this amendment was intended not to be subject to.[15] We find no such intent to exempt the federal employees brought within the coverage of the FLSA by this amendment from the effect of the Portal-to-Portal Act on their

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*(footnote continued from preceding page)*

subsection (b)(2) to conform to the repeal of the statute creating the class of employees covered there. Act of September 11, 1967, Pub. L. 90-83, § 8, 81 Stat. 222. As so amended, 29 U.S.C. § 218(b) now reads:

> (b) Notwithstanding any other provision of this chapter (other than section 213(f) of this title) or any other law—
>
> (1) *any Federal employee in the Canal Zone engaged in employment of the kind described in section 5102(c)(7) of Title 5* or
>
> (2) any employee in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, shall have his basic compensation fixed or adjusted at a wage rate that is not less than the appropriate wage rate provided for in section 206(a)(1) of this title (except that the wage rate provided for in section 206(b) of this title shall apply to any employee who performed services during the workweek in a work place within the Canal Zone), and *shall have his overtime compensation set at an hourly rate not less than the overtime rate provided for in section 207(a)(1) of this title.* (Emphasis added.)

[14] S. Rep. No. 1487, 89th Cong., 2d Sess. 22 (1966).

[15] *Id.* at 34.

rights to overtime compensation. Rather, we find in the legislative history of the amendment a clear indication that Congress intended to apply the principle of comparability—including an explicit attempt to bring the compensation of these federal employees in the Canal Zone within the same body of regulation as is applicable to private enterprise employees in that jurisdiction.

In 1965 congressional hearings were begun in both houses on a myriad of separate bills to amend the FLSA both to extend its coverage and to raise the minimum wage rate.[16] In the early stages of the House hearings, during the testimony of Secretary of Labor Wirtz, Representatives James Roosevelt and Augustus Hawkins raised the question of federal payment of wages below the FLSA's minimum rates:

> Mr. ROOSEVELT. . . . I am shocked by the fact that the Government itself violates this principle of minimum wages as much as anybody else. . . .
>
> It is our understanding that civilian contractors with the U.S. Government can pay less than a minimum wage if they are not covered by the [FLSA] or the Davis-Bacon Act or the Walsh-Healy Act. This means that the United States can be a party to the payment of a subminimum wage.
>
> Now, for the Government to be a party to that kind of thing, and at the same time to have you come before us and ask us to extend the general application to the rest of industry, it seems to me is absolutely inexcusable, and I would ask that the Depart-

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[16] A total of six volumes of hearings were published. *Hearings on Minimum Wage-Hour Amendments, 1965, H.R. 8259, Before the Subcomm. on Labor of the House Comm. on Education and Labor*, 89th Cong., 1st Sess., pts. 1-3 (1965) (hereafter *House Hearings*); *Hearings on Amendments to the Fair Labor Standards Act. S. 763, S. 1741, S. 1770, S. 1986, & S. 2210, Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 89th Cong., 1st & 2d Sess., pts. 1-4 (1965 & 1966).

ment look into this situation and report to this committee. . . .

Mr. HAWKINS. Would you add to that, Mr. Chairman, also the employees, as I understand, here in the Capitol? Some investigation should be made of them. I understand that there are many of them that are working at $1 an hour.

Mr. ROOSEVELT. If it is possible, Mr. Secretary, for you to give us information as to anywhere in the Government service where people are legally working on Government payrolls at less than the minimum wage, we would like to have it.

• • • •

[W]e had better drop this entire bill . . . if the Government can't apply the same standard it is applying to other people, to itself, [because] then we don't have much basis for what we are doing.

*House Hearings*, pt. 1, at 59-60. Secretary Wirtz agreed to provide the requested information, but he expressed some concern about Mr. Roosevelt's apparent view that the Government was obliged to pay the FLSA minimum wage rate:

[I]t should be made quite clear that the question is whether the Government should do voluntarily, and in the absence of legal obligation, that which the Congress has required in certain areas. . . .

Now, I agree with the point, Mr. Chairman, but the Government does, in its administrative capacity, already go beyond what the Congress has required of industry.

I hope especially in view of your admonition, I can expand the area of that, or be helpful in expanding the area of that voluntary action but it is not that we act in a way which is different from what is required.

*Id.* at 60-61.

The bill that emerged from the Committee's deliberations contained two sections dealing with the problems discussed above. One of these required that "every employer providing a contract service under a contract with the United States, or any subcontract thereunder, must pay" the FLSA minimum wage rate.[17] The second required payment of FLSA minimum wage and overtime rates to "certain Federal wage board employees and employees in nonappropriated fund instrumentalities of the Armed Forces, e.g. post exchanges," but, only to those employees working within the United States.[18] The House passed and sent to the Senate the bill containing these provisions.

In its provision concerning federal employees, the Senate bill differed in three respects from the House version: (1) another class of employees was added, (2) the geographical limitation was dropped, and (3) *a specific provision dealing with federal employees in the Canal Zone was added.*[19] The language dealing with the Canal Zone employees was added to the bill in committee by Senator Morse.[20] Since this language had been added after closing the hearings, Senator Morse inserted a personal statement and all the correspondence received by the committee into the *Congressional Record* to serve as the legislative history behind the provision.

Opposition to the proposal[21] centered on increased op-

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[17] H.R. Rep. No. 1366, 89th Cong., 2d Sess. 44 (1966). This portion of the House bill was adopted virtually intact as Section 305 of the final act.

[18] *Id.*

[19] H.R. Rep. No. 2004 (Conference Report), 89th Cong., 2d Sess. 12, 20 (1966).

[20] 112 Cong. Rec. 20830 (1966).

[21] Correspondence in opposition to the Morse amendment came from the Under Secretary of the Army (the Department of the Army is directly interestd in the Panama Canal Company), the Intercoastal Steamship Freight Association and the American Merchant Marine Institute (both associations composed of users of the Canal). *Id.* at 20831.

erating costs resulting from higher wage rates, with the resultant possibility that these might lead to higher tolls on ships using the Canal. Another rationale for opposing the bill was that it would increase an already large wage differential between Panamanian citizens employed in the Canal Zone and in the Republic of Panama itself.[22] This differential, it was argued, would impede the integration of the Canal Zone into the Panamanian economy and might serve to intensify political frictions with the government of Panama.

This last fear was laid to rest by a letter from the Minister of Foreign Relations of the Republic of Panama, dated May 30, 1966:

> I am of the opinion that an argument of this type would be totally unfounded. In effect, the different administrations that the Republic has had have always defended in favor of the Panamanian worker in the service of the Government of the United States of America in the Canal Zone and of the private enterpises that work for it, *their right to earn, equal with the United States worker, the same salary for the same work.*

112 Cong. Rec. 20833 (1966) (emphasis added). It would seem from this leter that the most likely source of political friction with the Panamanian government was the wage differential betwen American and Panamanian Canal workers, rather than between Panamanians working in the Canal Zone and in the Republic. Senator Morse recog-

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[22] The American Merchant Marine Institute so contended. *Id.* Senator Morse explained his rationale for equality of wages in the Canal Zone and in the U.S.:

> We should be doing everything we can to impress upon Panamanians and Latin Americans everywhere that the Canal is a boon to private enterprise and that its fruits can and will be shared on a basis of *full equality.*

*Id.* at 20830 (emphasis added).

nized this as the critical problem,[23] and while acknowledging that his amendment would surely lead to higher costs and posibly to higher canal tolls,[24] he stated the basic purpose of his amendment:

> What is at issue here is whether the Canal Zone government is going to pay Panamanian nationals—for it is they who are at the bottom of the wage scale and hold most of the jobs that would be affected—a statutory minimum wage which must be paid to Americans elsewhere, and *which must be paid to American and Panamanians alike in the Canal Zone if they are employed by private employers.*

*Id.* at 20830 (emphasis added). The purpose of this legislation, then, as stated by the author, was to achieve wage comparability for Government employees—both comparability between Panamanian and American nationals, and comparability between Government employees and employees of private enterprises working in the Canal Zone.

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[23]

> But I assure Senators that disparity among Panamanians is not the source of dissent. Dissension arises from the disparity in wages paid to Americans and Panamanians who each work for the United States in the Zone, and despite all the assurances that the pay is equal, the fact is that it is not.
>
> The American worker doing the same work as a Panamanian receives in theory the same wage. But on top of it he receives what is called a "tropical living allowance" which the Panamanian does not receive.

*Id.*

[24]

> I am concerned about the possibility that paying Panamanians a minimum wage will result in some increase in canal tolls. The canal is self-supporting. It does not receive appropriations. It fixes tolls according to costs. The wage cost will go up if the bill is enacted in this form.
>
> But I ask Senators, what wage cost will not go up upon enactment of this bill, where the wages paid are less than the figures included in the bill?

*Id.*

The Conference Committee adopted the Senate version of the bill, with Senator Morse's Canal Zone amendment intact. Presenting the Conference bill to the Senate, Senator Yarborough, the Floor Manager, described the federal employee provision as follows:

> The bill would incorporate in a new section 18(b) of the [FLSA] the policy of paying minimum wages and overtime pay *as required by the act* to certain Federal wage board employees. . . .

112 Cong. Rec. 22651 (1966) (emphasis added). Coupled with the operative provisions of Section 18(b), that these employees would have their wages and overtime compensation set at rates no lower than those provided in Sections 6 & 7 of the FLSA, we find in such statements a convincing repudiation of the appellants' theory that this act was intended to import only minimum wage rate provisions of the FLSA into federal employment.

Under Section 18(b) the minimum wage and overtime compensation requirements of the FLSA were imposed upon the Panama Canal Company to require it to pay its employees according to the prescribed statutory schedules of rates and hours for the regular and overtime hours that they worked. But the Portal-to-Portal Act applies to all pay schedules under the FLSA and explicitly relieves the Company from "any liability . . . under the [FLSA]" for certain specifically enumerated activities. In other words, the Portal-to-Portal Act operates to deprive employees covered by the FLSA of any cause of action against their employer for either minimum wage or overtime compensation under the FLSA for the activities specified in the Portal Act. Although the appellants here were brought within the coverage of the FLSA by Section 18(b), the Portal Act denies them a cause of action against the Canal Company for overtime compensation under FLSA.

The purpose of the Morse amendment, to achieve comparability of treatment between federal and private em-

ployees in the Canal Zone, would be defeated if only the benefits of FLSA (*e.g.* its minimum rates) and not its limitations (*e.g.* the Portal-to-Portal Act definition of noncompensable activities) were held to apply to appellants. The limitations of the Portal-to-Portal Act are an integral part of the overtime compensation prescribed by the FLSA. If these limitations were to be ignored, what started out to provide for equality between private employees who were under FLSA and these Canal employees who were not covered, would end up by placing the Canal employees in the superior position. However, since Congress merely intended to provide for equality of treatment between the two groups, and since those private employees are subject to the limitations of the Portal-to-Portal Act, we believe Congress intended those federal employees (including these Canal Company employees) brought within the FLSA by Section 18(b) to also be governed by the Portal-to-Portal Act provisions.[25]

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[25] Appellants argue that the "Notwithstanding any other provision of this Act . . . or any other law . . ." language at the beginning of § 18(b) explicitly excludes Portal-to-Portal Act application to the federal employees covered therein. We do not believe this exclusionary clause operates so broadly. To begin, its principle purpose was clearly to avoid the § 3(d) definition of "employer" that excluded the United States as an employer from coverage under the FLSA. 29 U.S.C. § 203(d). Next, as noted in the Senate Report, the clause operates to exclude "the industry committee procedures of section 6(c) [29 U.S.C. § 206(c)] . . . with respect to Federal employees employed in Puerto Rico and the Virgin Islands." S. REP. No. 1487, *supra*, at 34. Finally, the statute of limitations for the FLSA is contained in Section 6 of the Portal-to-Portal Act, 29 U.S.C. § 255, and this very section was amended by Section 601 of the act we are examining here. Fair Labor Standards Amendments of 1966, Pub. L. 89-601, Title VI, § 601, 80 Stat. 844. We cannot assume that, having both Acts before them and considering amendments to both Acts, Congress intended in its "notwithstanding" clause to provide that the statute of limitations did not apply to wage claims under this one section of the FLSA. And since the limitation statute applicable to the FLSA wage claims is a part of the Portal-to-Portal Act, we cannot assume that the "notwithstanding" clause can be said to have excluded portions of that Act while retaining others.

2. *1967 enactments relating to 5 U.S.C. § 5544.*

Although appellants are explicitly within the category of federal employees described in Section 18(b) of the FLSA, to which section we believe the Portal-to-Portal Act clearly applies, they chose to bring this action under a section of the Federal Employees Pay Act (FEPA), 5 U.S.C. § 5544.[26] Appellants argue that regardless of our view of the applicability of the Portal-to-Portal Act to FLSA § 18(b), that Act cannot be construed to limit their entitlement to compensation under 5 U.S.C. § 5544. Their argument has some merit, for the operative scheme of the Portal-to-Portal Act is to exempt employers from liability under the FLSA and two other specifically enumerated acts not including the FEPA. Strict adherence to the old maxim *expressio unius est exclusio alterius* or a mechanical application of the rule that the role of the court "is to construe what Congress has written . . . neither to add nor to subtract,"[27] would preclude our extending the applicability of the Portal Act to 5 U.S.C. § 5544.

But rigidly technical application of such rules has been frequently and authoritatively repudiated:

> The maxim invoked expresses a rule of construction, not of substantive law, and serves only as an aid in discovering the legislative intent when that is not otherwise manifest. . . .
>
> Much of our national legislation is embodied in codes, or systematic collections of general rules, each dealing in a comprehensive way with some general subject, . . . and it is the settled rule of decision in this court that where there is subsequent legislation upon such a subject, it carries with it an implication

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[26] The Company has stipulated that appellants are federal wage board employees under § 5544.

[27] 62 Cases of Jam v. United States, 340 U.S. 593, 596 (1951).

> that the general rules are not superseded, but are to be applied in its enforcement, save as the contrary clearly appears.

*United States* v. *Barnes*, 222 U.S. 513, 519, 520 (1912).

> However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.

*SEC* v. *C.M. Joiner Leasing Corporation*, 320 U.S. 344, 350-51 (1943).[22] The general rules embodied in the FLSA are those concerning the establishment of minimum allowable wage rates that an employer may pay his employees for the hours they work. The general rules embodied in the Portal-to-Portal Act are that certain employee activities, which the Supreme Court had found compensable under the FLSA in the *Mt. Clemens Pottery* case, were

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[22] *See, e.g.*, Argosy Limited v. Hennigan, 404 F.2d 14, 20 (5th Cir. 1968):

> Statutes are contextual as well as textual. . . . Their proper interpretation requires more than mere linguistic seriation. Courts must also look to the logic of Congress and to the broad national policy which prompted the legislation. [Citations omitted.]

FTC v. Standard Motor Prod., Inc., 371 F.2d 613, 617-18 (2d Cir. 1967); Massachusets Trustees of Eastern Gas & Fuel Assoc. v. United States, 312 F.2d 214, 220 (1st Cir. 1963), *aff'd*, 377 U.S. 235 (1964); United States v. National Marine Eng'r Ben. Ass'n, 294 F.2d 385, 390-91 (2d Cir. 1961); Matheson v. Armbrust, 284 F.2d 670, 674-75 (9th Cir. 1960), *cert. denied*, 365 U.S. 870 (1961); 2 SUTHERLAND, STATUTORY CONSTRUCTION § 4917 (3d ed. Horack 1943 & 1971 Supp.)

not entitled to compensation when performed at specified times and places. The operative scheme of the Portal Act —relieving employers from liability for compensating employees for these activities—required express enumeration of the statutes under which, *at that time*, the employer's liability could be incurred. Subsequent legislation either providing new bases for employers' liability, or bringing new groups of employers within the coverage of existing liability provisions, should not be construed to supersede the general rule of the Portal Act defining non-compensable activities "save as the contrary clearly appears." Considering both the text of the Portal Act and the context of the legislative policy applied therein to free employers from the obligation to compensate their employees for certain activities, we find that the interpretation of 5 U.S.C. § 5544 advocated by appellants would wholly abrogate that legislative policy. This we cannot do.

Yet we need not take this step on our own, relying solely on the legislative policy of the Portal-to-Portal Act. For in its policy of wage comparability between federal and private employees, as expressed in two separate enactments in 1967, Congress has provided us with a clear demonstration of their intent that these federal (Canal Company) employees should receive wage and hour treatment substantially equivalent to their counterparts in private enterprises.

*Act of September 11, 1967.*[29] This Act, titled "An Act to amend titles 5, 14, and 37, United States Code, to codify recent law, and to improve the Code,"[30] contains a superficially minor technical revision to the 1966 amendment which added Section 18(b) to the FLSA. This revision, however, reveals a great deal about Congress's concept of the relationship between the FLSA and the FEPA.

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[29] Pub. L. 90-83, §§ 1(97) & 8, 81 Stat. 220, 222.

[30] *Id.* at 81 Stat. 195.

In Section 1(97) of the act Congress incorporated a direct cross reference to the minimum wage provision of FLSA (29 U.S.C. § 206(a)(1)) into 5 U.S.C. § 5341(a)—the basic provision of the FEPA covering compensation of wage board employees. Section 8 of the act amended Section 18(b) of the FLSA, in the words of both the House and Senate Reports accompanying the bill, "to reflect the codification of that part of section 18(b)(1) that applies to Federal employees described in 5 U.S.C. 5341 (a) by sectiton 1(97) of this bill."[11] *It seems beyond question that the intent of these two sections is to import the FLSA's minimum wage provisons explicitly into the FEPA section covering compensation of wage board employees.*

The committee reports explain why the FLSA's overtime provision was not similarly transposed into the FEPA: "The provisions of section 18(b) relative to overtime compensation are omitted as unnecessary in view of 5 U.S.C. 5544(a)."[12] From this it is apparent that Congress considered 5 U.S.C. § 5544, a special provision relating to overtime compensation of wage board employees, to already be equivalent to Section 7 of the FLSA. In effect, this constitutes a declaration that the portion of Section 18(b) dealing with overtime compensation for wage board employees had been redundant with the previously existing Section 5544. We conclude from this that Congress intended that Section 5544 should operate for federal wage board employees in precisely the same manner as FLSA Section 7 operates for private employees. We thus conclude that the limitations of the Portal-to-Portal Act affect both provisions equally.

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[11] H.R. Rep. No. 124, 90th Cong., 1st Sess. 28 (1967); S. Rep. No. 482, 90th Cong., 1st Sess. 32 (1967). Section 8 of the act also deleted a class of employees from Section 18(b) that had been eliminated in other legislation, and up-dated some of the cross-referenced Code sections.

[12] *Id.* at 28 and 31.

*The Postal Revenue and Federal Salary Act of 1967.* Appellants place great reliance on the final sentence of 5 U.S.C. § 5544(a), which was added by Section 222 of the Postal Revenue and Federal Salary Act of 1967:[33]

> Time spent in a travel status away from the official duty station of an employee subject to this subsection is not hours of work unless the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively.

They argue that:[34]

> Had Congress intended the Portal to Portal Act to apply to federal wage board employees, it would not have been necessary for it to have added the above quoted language to 5 U.S.C. Section 5544, especially after it had amended Section 18 of the FLSA [in 1966].
>
> Accordingly, it is the travel time language of 5 U.S.C. Section 5544 to which the district court should have looked for guidance and not the Portal to Portal Act. . . .

This whole approach belies the ordinary meaning of travel—to go on a trip, tour, or journey (Websters 3d New International Dictionary)—and furthermore the legislative history of this amendment directly refutes the interpretation appellants seek to place on it. To begin, appellants' reference to "Section 18 of the FLSA" is surely misguided, since, as we have just shown, the overtime reference in Section 18(b), as it applied to wage board employees other than those working in the Canal Zone,

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[33] Pub. L. 90-206, Title II, § 222, 81 Stat. 641.

[34] Brief for appellants, at 17-18.

was removed three months prior to this act in the belief that it was redundant with Section 5544. As we shall demonstrate below, the travel time language was added to Section 5544 to *ensure* that redundancy—*i.e.* to make explicit the identity of operation Congress was seeking between Section 5544 and the FLSA's overtime provisions.

The travel provision began as an amendment to the House bill during House consideration of the measure. Among the many compromises accompanying passage of the House bill was a reduction in the proposed salary increase for classified employees. Representative Udall, one of the bill's sponsors, reported to the House that to compensate for this reduction "we consulted with these people to find out which fringe benefit amendment they feel is the most urgent, which would cost the least, and which would give justice to their people." 113 CONG. REC. 28641 (1967). The travel pay provision, proposed as an amendment to 5 U.S.C. § 5542 (the general overtime authorization for classified employees), was described by Mr. Udall as follows:

> This amendment picks up the fair labor standards provisions that apply *in private enterprise* and attempts to make a beginning to link the Government treatment of overtime and premium pay for overtime involved in the cost of travel to *private enterprise standards.*

*Id.* (emphasis added). The intent to attain comparability with FLSA standards could hardly have been expressed more clearly.

The House bill was considered by the Senate Post Office and Civil Service Committee, which chose to expand on the "beginning" made in the House by extending the travel provisions to include wage board and postal field service employees as well as the classified service.[11] This

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[11] S. REP. No. 801, 90th Cong., 1st Sess. 30 (1967).

extension was accomplished, *inter alia*, by the Senate adding to 5 U.S.C. § 5544(a) the precise language that was subsequently adopted. Identical language was added to 5 U.S.C. § 5542 and 39 U.S.C. § 3571 to cover classified and postal employees. The Conference Committee's substitute bill adopted the Senate version of the travel provision,[36] and was enacted as Section 222 of the Postal Revenue and Federal Salary Act of 1967.

In addition to Representative Udall's statement concerning the intent to make these provisions comparable to private enterprise standards, we find other indications that this amendment to Section 5544 was designed to compensate travel different in both type and extent from that for which appellants are seeking overtime pay. Appellants have focused on the Company's inability to predict the location of the locomotives from shift to shift to support the contention that their "travel" is compensable because it "results from an event which could not be scheduled or controlled administratively." Mr. Udall's formulation of this particular provision had read: "[time spent in travel outside the regularly scheduled workweek] is hours of work, if—(1) the employee is required to travel for a substantial distance because of an emergency arising from an event that could not be scheduled or controlled administratively. . . ." 113 CONG. REC. 28640 (1967). Admittedly, the Senate's, and the final statute's, abbreviation of this highly specific provision might be construed as an attempt to make it more broadly inclusive of other situations than those covered by Mr. Udall. But the Senate Report belies such a liberalizing intent and indicates an intent more in keeping with the ordinary meaning of the word "travel." In 1965 an act had been passed directing agencies to schedule travel away from the official duty station within the regularly scheduled

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[36] H.R. REP. No. 1013, 90th Cong., 1st Sess. 29 (1967).

workweek "[t]o the maximum extent practicable."[37] The Senate Report notes[38]:

> We are not satisfied with the progress agencies have made to comply with the 1965 act. An employee should not be required to travel on his offday in order to be at work at a temporary duty station early Monday morning to attend a meeting. It is an imposition upon his private life that should not be made. . . . Proper scheduling and administrative planning is the answer to the problems of travel pay in many cases. When emergencies occur or when events cannot be controlled realistically by those in authority, traveltime must be paid for.

The extent of the travel so referred to, from Sunday to Monday, indicates that Congress in this portion of the report was referring to travel more in the sense of a journey. It is clear to us that the "traveltime" made compensable under Section 5544 by events not capable of administrative scheduling or control was not intended to encompass the appellants' daily two to fifteen minute walks to their locomotives from the gate.

Finally, we find in the structure of the 1967 travel pay provisions further reason to believe that Congress intended to equate federal and private enterprise employees' compensation in regard to travel time. The Wage and Hour Division of the Department of Labor has promulgated regulations pursuant to the FLSA to explain and illustrate the application of that act to various travel situations. 29 C.F.R. §§ 785.33-.41 (1971). An examination of these regulations reveals a striking parallel between the descriptions of compensable travel time included therein and the enumerated categories of compensable travel found in the 1967 Act's amendments to Section 5544. Each

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[37] Federal Employees Salary Act of 1965, Pub. L. 89-301, § 16, Oct. 29, 1965, 79 Stat. 1123.

[38] S. Rep. No. 801, *supra* note 35, at 31.

example of compensable travel time in the FLSA regulations is included within one of the compensable categories of the 1967 Act, and the 1967 Act contains an additional category not included in the regulations.[39] Equally significant is that § 785.34 of these regulations describes the "[e]ffect of section 4 of the Portal-to-Portal Act" on compensation for travel time. If, to paraphrase the appellants' contention, Congress intended the Portal-to-Portal Act *not* to apply to federal wage board employees, we submit that they would have so indicated by inserting *another* additional category of compensable travel expressly providing for portal-to-portal payment. We consider their failure to do so to be a further reflection of their intent to pursue the policy of wage comparability between federal and private enterprise employees.[40]

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[39] *Compare* § 5544 "(i) involves the performance of work while traveling" *with* 29 C.F.R. "§ 785.41 Work performed while traveling." *Compare* "(ii) is incident to travel that involves the performance of work while traveling" *with* "§ 785.38 Travel that is all in the day's work." *Compare* "(iv) results from an event which could not be scheduled or controlled administratively" *with* "§ 785.36 Home to work in emergency situations" *and* "§ 785.37 Home to work on special one-day assignment in another city" *and* "§ 785.39 Travel away from home community." Section 5544's condition "(iii) is carried out under arduous conditions" has no direct parallel in these regulations, but may easily be read as a codification of the results of such cases as, *e.g.*, Tennessee Coal Co. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944) (construing the FLSA), and Anderson v. Panama Canal Co., 194 F. Supp. 765, 783 (D.C.Z. 1961) (construing the predecessor statute to 5 U.S.C. § 5544), *rev'd on other grounds*, 312 F.2d 98 (5th Cir.), *cert. denied*, 375 U.S. 832 (1963). Thus even this condition reflects the comparability between the respective FLSA and FEPA provisions.

[40] Although we have concluded above that Congress intended the Portal-to-Portal Act limitations on compensable overtime to apply to federal wage board employees covered under 5 U.S.C. § 5544(a), we believe that the same result could have been reached as to these Canal Zone employees by a different route. Because of the parties' stipulation below that these employees were within the

(*footnote continued on following page*)

## III

In *Abbott* v. *United States*, 151 F. Supp. 929 (Ct. Cl. 1957), ship pilots employed by the Panama Canal Company successfully sought overtime compensation for return trips to their home base after piloting a vessel through the Canal. The practice of the Company had been to consider these trips as working time and compensable when completed during the pilot's normal working hours, but non-compensable when made after the regular workweek or on the pilot's day off. The Court of Claims found this to be an irrational distinction, and since the normal custom was to compensate for these trips the court ordered that the pilots should be compensated whenever such trips occurred.

The Canal Company presently compensates locomotive operators called in on an emergency or stand-by basis from the moment they enter the gate to the lockage area, and the appellants argue by analogy to *Abbott* that the

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(*footnote continued from preceding page*)

coverage of § 5544, that issue was not litigated here. We note, however, that § 5544 derives from the Independent Offices Appropriation Act, 1935, ch. 102, Title II, § 23, 48 Stat. 522. Insofar as this statute relates to overtime compensation for Canal Company employees it was impliedly amended by the Fair Labor Standards Amendments of 1966, Pub. L. 89-601, Title III, § 306, 80 Stat. 841—the statute which explicitly applies the FLSA overtime compensation provision (with its Portal-to-Portal Act limitations) to wage board employees in the Canal Zone. As a later enactment, and as a specific enactment, the new Section 18(b) of the FLSA would seem to take precedence over the earlier, generally applicable, Section 5544. (Significantly, even the codification of § 5544 in its present location in the United States Code preceded enactment of Section 18(b) by 17 days, *compare* 80 Stat. 486 *with* 80 Stat. 841, and Section 18(b)'s specific reference to Canal Zone employees was reiterated the following year, 81 Stat. 222). We do not believe the enactment of the travel time provision in Section 5544 (81 Stat. 641) subsequent to the enactment of Section 18(b) affects this analysis at all, since such amendment does not alter the principal statutory language dealing with overtime compensation and it covers factual situations different from those under consideration here.

refusal to pay for similar activity incident to regular working hours is also an irrational distinction which requires that compensation be paid on a daily basis from their initial entry into the lockage area. The District Court distinguished *Abbott* by finding that

> [T]he emergency call-in for a locomotive operator creates an entirely different work situation than the normal scheduled work day. An emergency operator is in a stand-by situation without a particular duty station to report to immediately. Since he does not have an assigned duty station, and since he is present primarily for the benefit of the Company, a different standard must be used to fix his compensation and he is paid from the time he enters the main gate.[41]

We concur that *Abbott* does not apply here. The place, manner and circumstances of reporting for an emergency call-in all differ from what occurs in the daily routine and it appears that the Canal Company has properly treated all the employees' activity of such character as compensable. The nature of such emergency call-ins, if travel could be said to be involved, seems to fit the intent expressed in condition (iv) of the travel pay provisions of Section 5544. The irregular and isolated nature of emergency call-ins seems to "result from an event which could not be scheduled or controlled administratively" while the regular daily reporting practices do not fall within such definition.[42]

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[41] 314 F. Supp. at 388 n.1.

[42] We also reject appellants' argument that they fall within the scope of Anderson v. Panama Canal Co., *supra* note 39. As suggested above, we find the determinitive issue in *Anderson* to have been that the employees there were expected to perform arduous tasks under unpleasant and often dangerous conditions during the course of their travel. These circumstances are, we believe, incorporated within the third category of compensable travel under 5 U.S.C. § 5544. Appellants have made no claim under this category for their daily walk to the locomotives.

## IV.

We thus conclude that the congressisonal policy of the Portal-to-Portal Act to preclude compensation for activities such as those performed by these appellants, the policy of Section 18(b) of the FLSA to ensure equal compensation for private and federal employees in the Canal Zone, and the general policy of salary comparability between federal and private enterprise employees which is implicit in this legislation would all be thwarted were we to adopt appellants' position on this appeal. Accordingly, the judgment of the District Court is

*Affirmed.*

# In the Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-382

WADE V. CARTER, JR., ET AL., PETITIONERS

*v.*

PANAMA CANAL COMPANY

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners, who are towing locomotive operators employed by the federally-chartered Panama Canal Company, brought this action in the United States District Court for the District of Columbia on behalf of themselves and others similarly situated to recover overtime compensation for hours allegedly worked in excess of the statutory maximum provided in the Federal Employees Pay Act (FEPA), 5 U.S.C. 5544 (a).

Petitioners are employed at one of the three lockage areas on the Panama Canal; the electrical towing locomotives they operate guide ships through the locks. The Canal is run around the clock and each operator works an eight-hour shift. The operator's duty post at the start of the shift is the locomotive, which he walks to after passing through a gate at the entrance to the lockage area (Pet. App. 19a). If the locomotive is located at the farthest point from the entrance gate, it would take the operator a maximum of 15 minutes to walk to it. Since a locomotive could end up anywhere along the lock wall at the end of a shift and since operators are not permanently assigned to a particular locomotive, they usually arrive 15 minutes before the start of the shift in order to ensure being at their duty post when the shift begins.[1]

Petitioners argued that the 15-minute period, representing the approximate amount of time they were in the lockage areas preceding each shift change, constituted "overtime work" within the meaning of 5 U.S.C. 5544(a).[2] The district court dismissed their

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[1] Near each gate, at a point where the incoming employees have to pass by, is an assignment board informing each operator of the locomotive to which he is assigned and its location (Pet. App. 19a).

[2] Section 5544(a) provides, in pertinent part:

> An employee whose basic rate of pay is fixed and adjusted from time to time in accordance with prevailing rates by a wage board or similar administrative authority serving the same purpose *is entitled to overtime pay for overtime work in excess of 8 hours a day or 40 hours*

complaint, holding that 5 U.S.C. 5544 must be read together with the Fair Labor Standards Act (FLSA), 29 U.S.C. 201-219, as amended by the Portal-to-Portal Pay Act, 29 U.S.C. 251-262, and that as so read the 15-minute period per day did not constitute compensable worktime (Pet. App. 8a-15a). The court also held that under the *de minimus* rule of *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, "the time required to look for and place a check mark by a name on the assignment board and walk to a duty station (2 to 15 minutes) is negligible and not compensable" (Pet. App. 16a).

The court of appeals affirmed on the basis that petitioners were not entitled to compensation since the 15-minute period per day did not represent worktime in light of the Portal-to-Portal Pay Act; the court did not reach the question whether the *de minimus* rule precluded recovery (Pet. App. 17a-47a).

The decisions below are correct and further review is not warranted.

1. If petitioners were private employees covered by the FLSA they would not be entitled to overtime compensation under the maximum hours provision in Section 207(a)(1) of that Act, 29 U.S.C. 207(a)(1), since under the amendments to the FLSA in

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*a week.* However, an employee subject to this subsection who regularly is required to remain at or within the confines of his post of duty in excess of 8 hours a day in a standby or on-call status is entitled to overtime pay only for hours of duty, exclusive of eating and sleeping time, in excess of 40 a week * * * [emphasis added].

the Portal-to-Portal Pay Act, 29 U.S.C. 254(a), the following activities are not considered work:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

Although the FLSA originally did not apply to Federal workers such as petitioners, see 29 U.S.C. 203(d), in 1966 Congress extended the basic and overtime pay provisions of the Act to cover, among others, Federal employees in the Canal Zone. Act of September 23, 1966, 80 Stat. 841, as amended, 29 U.S.C. 218(b). Therefore, if only the FLSA were considered, petitioners could not successfully argue that they had been paid less than the minimum compensation set by law.[3]

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[3] Petitioners appear to argue that when Congress amended the FLSA in 1966 to cover Federal employees in the Canal Zone by providing that such employees shall not be paid less than the amount provided in Section 207(a)(1)—the FLSA maximum hours provision—Congress did not intend the Portal-to-Portal Pay Act provisions to apply (Pet. 8-9). However, to determine whether an employee is entitled to overtime compensation under Section 207(a)(1), one must decide whether his "workweek" exceeded the maximum of 40 hours. And in order to determine whether certain activities are

Petitioners argue, however, that their entitlement to overtime compensation should be determined solely under the provisions of the Federal Employees Pay Act, and specifically under 5 U.S.C. 5544. But the court of appeals, after thorough consideration of the relevant statutes and legislative history, correctly held that the purpose of the 1966 FLSA amendment, which brought Federal Canal Zone employees within the coverage of that Act, was to ensure that the minimum wage and maximum hours for both private and Federal employees within the area would not differ and that 5 U.S.C. 5544 must therefore be read in conjunction with the FLSA and the amendments thereto in the Portal-to-Portal Pay Act (Pet. App. 27a-35a). Otherwise, "what started out to provide for equality between private employees who were under FLSA and these Canal employees who were not covered, would end up by placing the Canal employees in the superior position" (Pet. App. 35a).

Moreover, underlying petitioners' contentions is the assumption that "overtime work" as used in 5 U.S.C. 5544(a) allows compensation for activities that are not included within the meaning of "workweek" as used in the FLSA maximum hours provision, 29 U.S.C. 207(a)(1)* However, even if the FLSA were

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properly included in the "workweek" one must refer to the Portal-to-Portal Pay Act, which describes the activities that are not to be considered as work within the meaning of the FLSA.

*Section 207(a)(1) provides:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any

not specifically applicable to petitioners, as it is, we believe that in determining whether petitioners' activities should be considered as work it would make no difference whether the statute said employees are entitled to overtime compensation for all "overtime work" or that employees should receive such compensation whenever their "workweek" exceeded the maximum number of hours. The question in both instances would be what Congress intended to be included as compensable activity and since the Federal Employees Pay Act does not define "overtime work" as used in 5 U.S.C. 5544, the explicit definition of work in the Portal-to-Portal Pay Act amendment to the FLSA should control.[8]

2. Relying on a recent amendment to 5 U.S.C. 5544 with regard to compensation for "[t]ime spent in a travel status away from the official duty station of an employee," petitioners argue that this provision supplies a definite standard for determining whether they should receive overtime pay in this case.

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workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

[8] Since in the Portal-to-Portal Pay Act, Congress rejected this Court's definition of "workweek" in *Anderson* v. *Mt. Clemens Pottery Co.*, *supra*, that Act should be consulted to determine what Congress intended to be considered as compensable activity.

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After examining this amendment and its legislative history, the court of appeals correctly concluded that the "'traveltime' made compensable under Section 5544 by events not capable of administrative scheduling or control was not intended to encompass the [petitioners'] daily two to fifteen minute walks to their locomotives from the gate" (Pet. App. 43a). In this regard, we rely on the opinion below.

8. We also rely on the opinion below (Pet. App. 45a-46a) with respect to petitioners' contention that they are entitled to overtime compensation under cases such as *Abbott* v. *United States*, 151 F. Supp. 929 (Ct. Cls.).

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*

OCTOBER 1972.

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